

REMARKS

The Examiner's Final Office Action mailed December 21, 2005 has been carefully considered. Various of the dependent claims have been re-written in independent form. No additional searches should be needed. As explained below, the outstanding rejections are defective and should be withdrawn.

Also, Applicant wishes to draw the Examiner's attention to the fact that the required Terminal Disclaimers were previously filed with Amendment A, June 18, 2004. This requirement was reiterated in the latest Office Action and it is believed to be moot in view of the prior filing.

As explained below, the rejections based on anticipation are defective in that they fail to comply with the standard set forth in the MPEP. As set forth therein:

"A claim is anticipated only if each and every element as set forth in the claim is found...the identical invention must be shown in as complete detail as is claimed in the...claim." (MPEP Rev. 3 August 2005, page 2100-76.)

The outstanding rejections simply do not conform to the above standard.

In rejecting claim 25, now incorporated into claim 21, the Examiner referred to "a deformable matrix (1)" (page 3 Office Action last line).

As explained in U.S. Patent 5,530,763 the filling material 1 is a hardened plastic. In this regard, the '763 patent states:

"The molding chamber between the diaphragm and the skeleton is filled by a suitable plastics material through the molding channel 34, the hearing aid being positioned in the auditory canal. The plastic hardens to the individualized shape member 1." (Col. 4, lines 58-63 '763 patent; emphasis added)

The above text from the '763 patent directly contradicts the Examiner's assertion at the bottom of page 3 of the Office Action. For at least the above reasons claims 21 as amended as well as the related dependent claims are all allowable. Similar comments apply to claim 104 and its dependent claims.

Relative to claim 23 (and claim 106), claim 23 includes the following limitation not met by the hearing aid of the '763 patent. Claim 23 requires that both "skin and spine...are distorted on insertion into the ear canal."

Column 5, lines 27-35 referred to by the Examiner in support of the rejection does not meet the above-quoted limitation. That text requires that the "skeleton or connecting member 5" be deformed prior to insertion into the ear canal. This arrangement is clearly set forth wherein the inventors of the '763 patent have stated:

"Surround the skeleton with the diaphragm 2 and fix the latter to the support elements 3 and 4 (points X). Approximately adopt the general hearing aid manufacture in the first three stages to an individual auditory canal by suitable deformation of the skeleton or connecting element 5. Position the roughly adapted hearing aid in the auditory canal and produce the shaped member by filling the molding chamber between the diaphragm and the skeleton. (Col. 5, lines 27-34, '763 patent).

Thus, as described above, the structural element 5 is deformed manually first before insertion into a user's ear canal. Thus element 5 is not "distorted on insertion into the ear canal," as in claim 23. Claim 23, and claim 106, as a result are not anticipated.

The rejection of claim 24 (and claim 107) also does not meet the standards of anticipation. Claim 24 requires that "the spine comprises a vent tube that is attached to the skin substantially along its length."

Claim 24 is not explicitly addressed on page 3 of the Office Action. Also, it is quite clear from Figs. 1, 2, 3 and 4 of the '763 patent that the member 5 is displaced from the external membrane 2. The intervening interval is filled by rigid plastic material 1. While the tube 5 illustrated in Figs. 3 and 4 of the '763 patent is hollow and functions as a vent tube, it is in fact as noted above displaced from the external membrane 2 with the intervening interval filled by the hardened plastic material 1. This does not comply with the limitation of claim 12 which requires that the vent tube be "attached to the skin substantially along its length." Claims 24,107 are not anticipated.

In claim 26 (and claim 109), rewritten in independent form, the Examiner expressly failed to deal with the following limitation of claim 26 which is unmet by the '763 patent:

"the at least one spine is integrally molded with the skin."

It is clear from looking at the figures of the '763 patent that the member 5 is separate from and displaced from the exterior membrane 2. It is clearly not "integrally molded with the skin" even when the material 1 is poured into the intervening region and permitted to harden. Thus claims 26, 109 are not anticipated.

Claim 27 (and claim 110) also not expressly addressed in the Office Action include the following limitation not met by the hearing aid of the '763 patent:

"the matrix is compressible in response to forces applied by the ear canal whereby a volume parameter of the internal region is dynamically altered in response to applied ear canal forces."

The material 1 of the '763 patent whether fluid or cured is not "compressible." When the material 1 has cured and is hardened, the "volume parameter of the internal region" is not alterable. If the hearing aid of the '763 patent should be squeezed before the material 1 hardens, that material will be ejected out the port 34 as it is not compressible. Thus claim 27 is not anticipated.

Claim 28 (claim 111) is dependent on claim 26 (claim 109). Claims 28 and 111 are allowable for at least the same reasons as are claims 26 and 109.

In rejecting claim 29 (also claim 112), the Examiner referred to "a compressible matrix (Figs. 1-2)", page 4, line 2 Office Action). The above is technically incorrect.

The material 1 which surrounds the output transducer 41 of Figs. 1 and 2 of the '763 patent is not compressible. It may be in a liquid state before it cures and hardens but it is not a compressible material. Hence, the rejection of claims 29 and 112 is also defective.

Claim 32 (and claim 115) is also not anticipated. The material 1 of the '763 patent is a non-compressible material which hardens upon being poured into the space formed by diaphragm 2. When the structure 5 and associated diaphragm 2 are inserted in to the ear canal prior to pouring in the material 1 there are no expansive forces.

When the material 1 is poured into the hearing aid, in the ear canal, if the user moves his or her jaw the fluid 1 may well deform. However, as it is curing at a relatively rapid rate it will end up with a shape that does not provide a seal in the ear canal. Rather, there will be spaces between the diaphragm 2 and the exterior periphery of the ear canal due to movement of the user's jaw while the material 1 is hardening. This does not comply with the limitation of claim 32 and claim 115, that requires:

"as the shape of the ear canal changes, due to movement of the user's jaw, the seal is broken, permitting air flow into the ear canal, and reforms as the matrix continues to apply expansive forces to the skin."

Claim 33 (also claim 116) was also improperly rejected for the same reasons. Additionally, claim 33 depends from claim 27 (116 depends from 110) which requires that the "matrix is compressible." As described above, Claims 27 and 110 were improperly rejected. Hence, claim 33 and claim 116 are also allowable for at least the same reasons.

Claim 31 (and claim 114) was rejected as obvious and unpatentable in view of the disclosure of the '763 patent. The Examiner's argument as to why claim 31 (and 114) would be obvious given the hardenable material 1 of the '763 patent does not comply with the requirements of the 35 U.S.C. 103 that the prior art provide a suggestion, motivation or teaching to modify the hearing aid of the '763 patent so as to make the subject claim obvious. The reference by the Examiner to "providing a desirable otoplastic material for the hearing aid housing is very well known." (page 4 Office Action, second last line) does not address the limitation of Claim 31 since the disclosure of the '763 patent is of a material which is a plastic which is a non-compressible fluid that hardens to a permanent shape unlike the claimed "open cell foam, a closed cell foam, and a fabric."

Thus, for at least the above reasons the pending claims are allowable. Applicant's attorney would like to conduct a telephone interview with the Examiner in connection with

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the pending claims, the outstanding Final Rejection, and the disclosure of the '763 patent. He will contact the Examiner shortly for purposes of scheduling a telephone interview.

Respectfully submitted,

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